Supreme Court, U. S.
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No. 76-1107

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT W. CROUCH and ALBERT KUDELKA, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

An indictment returned in the United States District Court for the Southern District of Texas charged petitioners with 15 counts of conspiring to make false statements with respect to information required to be kept by firearms dealers, with conspiracy to commit those crimes, in violation of 18 U.S.C. 371 and 924(a), and with conspiring to obstruct and obstructing justice, in violation of 18 U.S.C. 371 and 1510. A jury trial began on February 17, 1976, and continued until February 24, 1976. Three times during the trial petitioners moved for a mistrial, arguing that the jury had heard inadmissible or prejudicial evidence; the district court denied each of the motions (App. B, *infra*, pp. 2a-5a).[1]

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[1]Petitioners have neglected to reproduce the district court's order and opinion in their petition. See Rule 23(1)(i) of the Rules of this Court. For the convenience of the Court, we have reprinted them as Appendices A and B to this memorandum.

On February 24, 1976, as petitioners were presenting their case, the district judge recessed the trial because of personal reasons (Pet. 4). On March 8, 1976, the day before the trial was to have resumed, the district court reconsidered its rulings on petitioners' motions, granted their motions for a mistrial, dismissed the jury, and ordered a retrial (App. A, *infra*, p. 1a).

Petitioners then moved to dismiss the indictment, contending that a second trial would violate the Double Jeopardy Clause. The district court denied this motion (App. B, *infra*, pp. 2a-8a). The court discussed the circumstances that had led to petitioners' motions for mistrial and the reasons why, upon reconsideration, it had decided to grant those motions. Responding to petitioners' belated attempts to withdraw their motions for mistrial, the court stated (*id.* at 6a): "A defendant may not demand a mistrial and then complain because his motion was granted, especially where, as here, the [objection] comes after the jury has been discharged." The district court also concluded that it would have been manifestly necessary to declare a mistrial even over petitioners' objections, explaining that the inadmissible evidence that had been received "was so prejudicial that no instruction could have wholly removed the prejudice from the minds of the jurors" (*ibid.*).

Petitioners immediately appealed. The court of appeals, relying on *United States* v. *Bailey*, 512 F. 2d 833 (C.A. 5), dismissed the appeal for want of jurisdiction (Pet. App. 10). *Bailey* held that a district court's rejection of a double jeopardy claim, like the rejection of any other constitutional claim that may arise during criminal proceedings, must await resolution on appeal in the ordinary course after a

conviction. Petitioners argue that the court of appeals should have considered their appeal on the merits.[2]

The jurisdictional question presented in this case is presently before this Court in *Abney* v. *United States*, No. 75-6521, argued January 17, 1977. We believe that the Court's resolution of the jurisdictional issue in *Abney* is unlikely to be of assistance to petitioners. The Fourth Circuit, which has held in *United States* v. *Lansdown*, 460 F. 2d 164, that the denial of a double jeopardy claim ordinarily is appealable before trial, also has concluded that an appeal will not lie from an order setting a case for a second trial after a mistrial has been declared at the request of the accused. *United States* v. *Mandel*, C.A. 4, No. 77-1166, decided March 8, 1977.[3] The decision of the district court in this case is similar in some respects to the decision of the district court in *Mandel*—the court granted petitioners' motions for a mistrial, and in such circumstances the Double Jeopardy Clause ordinarily does not preclude a second trial. *United States* v. *Dinitz*, 424 U.S. 600.

It is not clear, however, that petitioners' arguments on the merits are so insubstantial that the court of appeals would decline to entertain them even if this Court were to hold in *Abney* that the denial of double jeopardy claims is reviewable by appeal before trial. We therefore submit that the Court should defer consideration of the present petition

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[2]Their petition for a writ of certiorari is one day out of time under Rule 22(2) of the Rules of this Court. The judgment of the court of appeals was entered on January 10, 1977, and the petition was not filed until February 10, 1977.

[3]We have reproduced this opinion as Appendix C to this memorandum.

until it has decided *Abney* and then dispose of this case as appropriate in light of that decision.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

DOJ-1977-04

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA

VS.

ROBERT W. CROUCH,
ALBERT KUDELKA, JR.

CRIMINAL NO. 75-G-27

ORDER

BE IT REMEMBERED that the above entitled and numbered case came on to be considered on defendants' several Motions for Mistrial, and the Court having reconsidered its rulings on said Motions made in open court, and it appearing to the Court that said Motions should be granted.

NOW, THEREFORE it is ORDERED that a MISTRIAL be, and is hereby, declared in the above entitled and numbered criminal case.

The Clerk shall file this Order, and shall notify counsel and the jurors that they should not appear as scheduled. A new trial setting will be made and counsel will be duly notified.

DONE at Houston, Texas, this 8th day of March, 1976.

/s/ JAMES NOEL

JUDGE PRESIDING

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA,

vs.

ROBERT CROUCH AND
ALBERT KUDELKA, JR., DEFENDANTS

CRIMINAL NO. 75-G-27

MEMORANDUM OPINION

The fifteen count indictment in this case charges that defendants Robert Crouch and Albert Kudelka, Jr., conspired to make and in fact made false statements with respect to information required to be kept by firearms dealers, and that defendants conspired to obstruct justice and that they in fact did so. The case was tried before a jury beginning on February 17, 1976 and was adjourned on February 24 until March 9, 1976. By Order of March 8, 1976 the Court granted defendants' Motions for Mistrial upon reconsideration of its rulings made in open court during the trial of the case. Defendants then filed pleas of former jeopardy bottomed on the contentions that (1) the Court's declaration of mistrial was sua sponte; and that (2) manifest necssity for the mistrial did not exist. By Order of April 20, 1976 the Court denied defendants' pleas of former jeopardy. This Memorandum Opinion develops the reasons for that ruling.

I.

Three motions for mistrial were made during the course of the trial. The first occurred on the morning of February 19, 1976 during the testimony of Fred Beck, a

former employee of defendant Crouch. Before Beck was called, Crouch's counsel approached the bench to state that the prosecution had agreed that evidence relating to a different case filed in the Houston Division of this District would not be entered into evidence. The prosecutor did not expressly confirm or deny this statement. The Court did not approve or disapprove the agreement, stating merely that it would see how the case developed. Beck testified that after he had left Crouch's employment he discovered that Crouch wished to "get rid of him", and that, as a result, he sought protection from the Bureau of Alcohol, Tobacco and Firearms (ATF), which was investigating the case. When asked by the prosecutor whether he was given money by the ATF as a result of seeking their protection, Crouch's attorney objected on the ground that the question was leading and suggestive. The Court sustained the objection and directed the prosecutor to ask the witness only what was said. When the prosecutor asked how the information came to him, the witness replied that ATF agents allowed him to listen to a tape recording of someone coversing with Crouch. Thus, in substance, Beck testified that he learned that Crouch wanted to kill him by listening to of a conversation between Crouch and a third party that was played for him by federal agents.

The jury was excused, and Crouch's counsel objected on three grounds: (1) that the statement was hearsay; (2) that the recording was obtained in violation of *Massiah* v. *United States,* 377 U.S. 201 (1964); and (3) that the elicitation of the statement violated the agreement between counsel because the tape recording pertained solely to the Houston case. Accordingly, Crouch's counsel moved in the alternative to strike and for the declaration of a mistrial. Counsel for defendant Kudelka adopted

the motion for mistrial. The Court, after a lengthy inquiry, granted the motion to strike, but denied the motion for mistrial. The jury was recalled and Crouch's counsel reurged both his motion to strike and for mistrial in their presence. The Court again denied the motion for mistrial, struck the question and Beck's answer from the record and instructed the jury not to consider them for any purpose.

The second and third motions for mistrial occurred during the direct examination of Special Agent Michael Taylor, the AFT agent in charge of the investigation. Taylor testified that he arrested defendant Kudelka in August, 1974, advised him of his constitutional rights, and had a conversation with him. Taylor then stated that he had asked Kudelka whether he would make a statement. The prosecutor asked what Kudelka's response was, and Taylor answered that Kudelka had said that he had an agreement with Crouch whereby he, Kudelka, would "stick to his story" and that in return Crouch would take care of him, pay all of his legal fees, and see that he wound up owning the pawn shop in Galveston. For that reason, Taylor stated that Kudelka chose not to make any further statement. Out of the presence of the jury, Crouch's counsel stated that he was surprised by Agent Taylor's testimony because the government had represented that it had tendered to defendants all statements made by them while they were in custody. The Court ruled that the statement would be stricken as the government had a duty to disclose and had failed to do so. Counsel for both defendants then moved for a mistrial on the ground that the statement was so highly prejudicial that no instruction could remove its impact from the minds of the jury. The Court overrruled both motions. Although the Court struck Taylor's testimony as to the agreement and directed the jury to disregard it,

Crouch's counsel subsequently cross-examined Taylor with respect to it and expressly withdrew his objection. Kudelka's counsel, however, did not withdraw his objection. Although Kudelka's counsel did briefly cross-examine Taylor, the Court, is of the view that he did not waive his objection.

As the direct examination of Taylor continued, the prosecutor questioned him about the arrest of defendant Crouch. Taylor stated that he had arrested Crouch in November of 1973 and had told him why he was being arrested and of his constitutional rights. The prosecutor then asked whether Crouch made any statement and Taylor replied that he did not. For the third time, Crouch's counsel moved for a mistrial on the ground that the Government had impermissibly shown that defendant Crouch exercised his Fifth Amendment right to remain silent. Counsel did not move to strike, and the Court denied the motion for mistrial.

II.

The threshhold issue in resolving defendants' pleas of former jeopardy is whether the Court acted sua sponte, or whether the declaration of mistrial was pursuant to defendants' request as is recited in the March 8th Order. If the Court acted on defendants' motions, they may not now complain that retrial would violate the Double Jeopardy clause. United States v. Jorn, 400 U.S. 470, 485 (1970). Whether defendants in fact consented to the declaration of mistrial depends on whether they retained "primary control over the course to be followed." United States v. Dinitz, 44 U.S.L.W. 4309 (S. Ct. March 8, 1976). On the foregoing facts, this criterion is clearly met. Neither the delay beteen the time when the motions for mistrial were made and the time that they were granted, nor the fact that the motions were initially

denied alters the fact that the mistrial was declared upon defendants' motions and for essentially the reasons that they urged. *See, e.g.,* United States v. Goldstein, 479 F. 2d 1061 (2d Cir. 1973); United States v. Pappas, 445 F. 2d 1194 (3d Cir. 1971). That defendant Crouch filed a "Motion to Rescind Sua Sponte Declaration of Mistrial" cannot alter this conclusion. A defendant may not demand a mistrial and then complain because his motion was granted, especially where, as here, the motion comes after the jury has been discharged.

Even if the declaration of mistrial were deemed to have constituted a sua sponte act of the Court, the abortion of the previous trial would not bar reprosecution because the "manifest necessity" test is clearly met under the facts described above. With respect to Beck's testimony, the other evidence of obstruction of justice by defendants was not so overwhelming that Beck's statement may not well have had a decisive impact. *See, e.g.,* United States v. Warf, F. 2d (5th Cir. Apr. 8, 1976). The statement was so prejudicial that no instruction could have wholly removed the prejudice from the minds of the jurors. Although subsequent testimony revealed that Beck learned from the ATF that his life was in danger, it would obviously make a great difference to a jury whether that conclusion was based on mere hunch and suspicion or upon the defendant's own words. In addition, the Court credits counsels' representations that they were surprised by Beck's statement by virtue of their reliance on the agreement between counsel regarding evidence relating to the Houston case, and their representation that they would have filed a motion to suppress had they known that the agreement was not enforceable. The Court also finds that Beck's testimony was not the product of prosecutorial overreaching, for the record reflects that

the prosecutor was merely attmepting to remove any unwarranted inference from the statement made by Crouch's counsel on voir dire that Beck had been paid money by the ATF. Moreover, the question that elicited Beck's response was asked as a result of an objection made by Crouch's counsel and of the Court's instruction to the prosecutor.

With respect to Agent Taylor's testimony that Kudelka stated upon his arrest that he entered into an arrangement with Crouch, the Court finds again that its instruction to the jury could not have removed the prejudicial impact. To repeat, this was not a case in which other, untainted evidence of the crime charged could reasonably be supposed to allay the degree of prejudice to the defendant. Here also, the Court is persuaded that there was no overreaching by the prosecutor, for the record suggests that the statement was not intentionally elicited and the Court credits the prosecutor's statement that he was surprised by Taylor's testimony. Taylor's statement that Crouch declined to make a statement after his arrest was clearly inadmissible. *E.g.,* Baker v. United States, 357 F. 2d 11 (5th Cir. 1966). Though not a sufficient ground for a mistrial in itself under the circumstances of this case, *see, e.g.,* United States v. White, 463 F. 2d 18 (9th Cir. 1972), the evidence that Crouch remained silent constituted an additional circumstance compelling the conclusion that a mistrial should be declared.

In sum, the Court rules (1) that it did not act sua sponte in aborting the trial begun on February 17, 1976; and (2) that under the circumstances of the case, the inadmissible testimony by Beck and Taylor that was presented in the jury's presence was so prejudicial as to require that the trial be aborted.

The Clerk shall file this Memorandum Opinion and send a copy to counsel.

DONE at Houston, Texas, this 27th day of April, 1976.

/s/ JAMES NOEL

JUDGE PRESIDING

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-1166

UNITED STATES OF AMERICA, APPELLEE,

v.

MARVIN MANDEL, W. DALE HESS, HARRY W. ROGERS, III, AND ERNEST N. CORY, JR., APPELLANTS.

No. 77-1167

UNITED STATES OF AMERICA, APPELLEE,

v.

WILLIAM A. RODGERS, APPELLANT.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Robert L. Taylor, District Judge.

Submitted March 1, 1977
Decided March 8, 1977.

Before CRAVEN, BUTZNER and WIDENER, Circuit Judges.

PER CURIAM:

Marvin Mandel, W. Dale Hess, Harry W. Rogers, III, William A. Rodgers, and Ernest N. Cory appeal an order of the district court denying their plea of double jeopardy. The government moves to dismiss the appeal on the ground that the order is not appealable under 28 U.S.C. §§1291 or 1292. We grant the motion to dismiss.

After the government had spent approximately 12 weeks presenting its evidence, the district court granted the defendants' motion for a mistrial. Another judge was designated to preside over the retrial. On January 12, 1977, he orally denied a motion to dismiss the indictment on the ground of double jeopardy and set the case for retrial on April 13, 1977. Subsequently, he filed a memorandum and order supplementing his previous oral rulings.

Contending that the denial of the plea of double jeopardy is a final order within the meaning of 28 U.S.C. §1291, the defendants have appealed. On the other hand, the government asserts that an order granting a mistrial on the motion of a defendant is nonappealable.

In United States v. Lansdown, 460 F. 2d 164 (4th Cir. 1972), applying the exception to the final judgment rule set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), we took jurisdiction to hear and determine an appeal from an order denying a plea of double jeopardy.* Post-trial consideration of the issue, we reasoned, could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial. *See* Green v. United

*Jurisdiction for such appeals is one of the issues in Abney v. United States, No. 75-6521, which was argued before the Supreme Court on January 17, 1977.

States, 355 U.S. 184, 187 (1957). We restricted our holding, however, by stating that it did not apply in cases where a mistrial was declared at the request of the defendant. 460 F. 2d at 171 n. 8. A recent decision of the Supreme Court, however, casts doubt on this unqualified restriction when the record discloses that bad faith conduct by the prosecution or the judge caused the defendant to request a mistrial. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976). Nevertheless, we need not determine in this case whether the restriction in *Lansdown* should be qualified by *Dinitz*.

The newly-designated district judge fount that neither the prosecutor nor the former trial judge acted in bad faith to provoke a mistrial. In the memorandum supplementing his oral rulings, he said, with reference to actions taken after the discovery of attempts by third persons to cause a mistrial and tamper with the jury:

> The actions were undertaken by the Court and Government for the purpose of preserving the trial and preventing the jury from being tainted by prejudicial publicity. They were intended to enhance the defendants' prospects for a fair trial rather than to prejudice the defendants.[4] Defendants' motions to dismiss must accordingly be denied.

In note 4 he added:

> The Court has considered the "totality of the circumstances" and is of the opinion that the record as a whole falls far short of demonstrating bad faith prosecutorial misconduct.

The district judge's findings are amply supported by the record. Accordingly, since the mistrial was granted on the defendants' motion without bad faith provocation by the court or the prosecutor, this appeal must be dismissed. United States v. Lansdown, 460 F. 2d at 171 n. 8.